

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Part 31**

[FAR Case 92-24]

RIN 9000-AG53

**Federal Acquisition Regulation;
Employee Stock Ownership Plans**

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are proposing changes to the cost principles in the Federal Acquisition Regulation (FAR) to address employee stock ownership plans (ESOPs). The purpose is to ensure uniform treatment on the allowability of costs of all ESOP's irrespective of whether the ESOP is structured as a pension plan or as deferred compensation, including making the interest costs of leveraged ESOPs expressly unallowable. This regulatory action was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

DATES: Comments should be submitted on or before January 8, 1996 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets NW., Room 4037, Washington, DC 20405.

Please cite FAR case 92-24 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Mr. Jeremy Olson at (202) 501-3221 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405, (202) 501-4755. Please cite FAR case 92-24.

SUPPLEMENTARY INFORMATION:**A. Background**

By moving the current language on ESOP's from FAR 31.205-6(j)(8) to a new 31.205-6(p), the proposed rule recognizes that ESOPs may be governed by either the cost principle at 31.205-6(j), Pension plans, or 31.205-6(k), deferred compensation. The rule also

makes the interest costs on borrowings of leveraged ESOP's expressly unallowable in accordance with FAR 31.205-20, thus placing leveraged ESOP's on the same basis as non-leveraged ESOP's; limits the allowability of noncash contributions to the Employee Stock Ownership Trust (ESOT) to the fair market value on the date that the contractor effectively loses control of the asset to the ESOT or pledges the asset to lender as loan collateral; and proposes a ceiling of 15 percent on payroll-related contributions, which is in consonance with limits on similar supplemental retirement plans under the Internal Revenue Code.

B. Regulatory Flexibility Act

This proposed rule broadens a condition of allowability of costs upon contractors who wish to be reimbursed under Government contracts. The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, applies, but the rule is not expected to have a significant economic impact on a substantial number of small entities because most contracts awarded to small entities are awarded on a competitive, fixed-price basis and the cost principles do not apply. An Initial Regulatory Flexibility Analysis has therefore not been performed. Comments from small entities concerning the affected FAR subpart will also be considered in accordance with section 610 of the Act. Such comments must be submitted separately and cite FAR case 92-24 in correspondence.

C. Paperwork Reduction Act

This proposed rule is a broader application of an existing cost principle but does not affect how contractors account for costs of ESOPs. The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

List of Subjects in 48 CFR Part 31

Government procurement.

Dated: October 26, 1995.

C. Allen Olson,

Director, Office of Federal Acquisition Policy.

Therefore, it is proposed that 48 CFR Part 31 be amended as set forth below:

1. The authority citation for 48 CFR Part 31 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

**PART 31—CONTRACT COST
PRINCIPLES AND PROCEDURES**

2. Section 31.205-6 is amended by removing paragraph (j)(8) and adding paragraph (p) to read as follows:

31.205-6 Compensation for personal services.

* * * * *

(p) *Employee stock ownership plans (ESOPs).* An ESOP is an individual stock bonus plan designed specifically to invest in the stock of the employer corporation. The contractor's contributions to a trust of an ESOP may be in the form of cash, stock, or noncash assets. In addition to specifically applicable pension and deferred compensation cost principles in paragraphs (j) and (k), respectively, of this subsection, ESOP costs are allowable subject to the following provisions:

(1) Any portion of an ESOP cost assigned to a year which is not paid to the Employee Stock Ownership Trust (ESOT) by the time set for filing of the Federal income tax return for that year, or any extension thereof, shall not be allowable.

(2) The contractor shall provide the contracting officer or designated representative access to the books and records of the ESOT and to any independent analysis of the fair market value of the stock in the ESOT made for purposes of the ESOP. This includes analyses made either for the ESOT or for the contractor.

(3) The contractor shall furnish evidence satisfactory to the contracting officer demonstrating that acquisitions of stock or noncash assets by the ESOT are made at the stock's or noncash asset's fair market value. Any amount in excess of the fair market value is unallowable.

(i) For purposes of applying the allowability criteria under paragraph (p)(6) of this subsection, the fair market value of the stock or noncash assets shall be determined as of the close of business on the next business day after the transaction date.

(ii) For contractor contributions of stock or noncash assets, the transaction date is the date on which the contractor sells, assigns, or otherwise transfers control of the stock or noncash asset to the ESOT or to a financial institution.

(4) When the stock used by the ESOT to satisfy the plan requirements of an ESOP is not publicly traded or the contracting officer determines that the stock was not publicly traded in sufficient quantities to establish the fair market value, the fair market value of the stock in paragraph (p)(3) of this

subsection shall be determined on a case-by-case basis by the contracting officer, taking into consideration the guidelines for valuation used by the IRS.

There is no presumption of allowability for the valuations claimed by the contractor for such stock. Any amount determined to be attributable to excess stock valuations is unallowable.

(5) Contractor contributions to an ESOT are unallowable to the extent they are used by the ESOT to pay interest on borrowings, however represented.

(6) the allowable amount of ESOP cost for a given year shall not exceed the lesser of—

(i) The fair market value, as determined in paragraphs (p)(3) and (p)(4) of this subsection, of stock shares credited to the accounts of individual ESOP participants during that year reduced by—

(A) The fair market value of any forfeitures that are reallocated to plan participants; and

(B) Dividends applicable to shares credited to plan participants; or

(ii) 15 percent of the salaries and wages of the employees participating in the ESOP for that year.

(7) In addition to paragraph (p)(6) of this subsection, the costs to administer

an ESOP are allowable, if reasonable in amount. These allowable costs do not include costs which are otherwise unallowable under part 31.

(8) Any increased costs resulting from conversion of the ESOP from a pension to a non-pension plan or from a non-pension to a pension plan are unallowable.

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